

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

GORDON KIRK KEMPPAINEN  
TDCJ-CID #113389

v.

ARANSAS COUNTY DETENTION  
CENTER, ET AL.

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C.A. NO. C-06-463

**MEMORANDUM AND RECOMMENDATION TO  
GRANT PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL**

This is a civil rights action filed by a state prisoner pursuant to 42 U.S.C. § 1983. Pending is his motion for voluntary dismissal of his action. (D.E. 14).

Plaintiff filed an application to proceed *in forma pauperis* in this proceeding. (D.E. 3). On October 23, 2006, an Order for Initial Partial Filing Fee and Collection Order was issued. (D.E. 10). That motion contained a notice to plaintiff that he could voluntarily dismiss his action within thirty days to avoid paying the filing fee. *Id.* at 2. On November 2, 2006, a Spears hearing was conducted. On November 8, 2006, a memorandum and recommendation was issued, recommending the dismissal of plaintiff's action. (D.E. 11). Plaintiff filed his pending motion on November 20, 2006, which was within the thirty-day period addressed in the Order for Initial Partial Filing Fee and Collection Order.

Plaintiff's motion is pursuant to Rule 41 of the Federal Rules of Civil

Procedure:

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

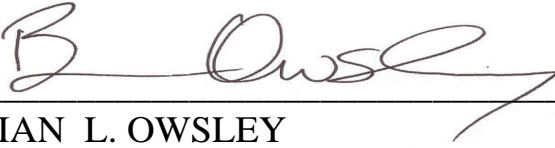
Fed. R. Civ. P. 41(a)(1). The Fifth Circuit has established that a “plaintiff has the right to file a notice of dismissal at any time before the defendant has filed either an answer or a motion for summary judgment” pursuant to Rule 41(a)(1). Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc., 434 F.3d 320, 324 (5th Cir. 2005). Moreover, a “plaintiff has an ‘absolute right’ to a Rule 41(a)(1) dismissal.” Id.

Here, service of process of plaintiff’s action has not been ordered. Consequently, defendants have neither filed an answer, nor filed a dispositive motion.

Accordingly, it is respectfully recommended that plaintiff’s motion for a voluntary dismissal of his action, (D.E. 14), be GRANTED. Furthermore, it is

respectfully recommended that his action be dismissed without prejudice.

ORDERED this 27th day of November 2006.



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BRIAN L. OWSLEY  
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **TEN (10) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1)(C); Rule 72(b) of the Federal Rules of Civil Procedure; and Article IV, General Order No. 02-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within TEN (10) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).